

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DON DURANT, JR.,)	
)	
Plaintiff,)	Civil Action No. 06-39
)	
v.)	Judge McVerry
)	Magistrate Judge Caiazza
JO ANNE B. BARNHART,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the District Court grant the Plaintiff's Motion for Summary Judgment (Doc. 8), deny the Defendant's Motion for Summary Judgment (Doc. 10), and remand this case for further administrative proceedings.

II. REPORT

The Plaintiff Don Durant, Jr. ("Mr. Durant" or "the Claimant") has filed this social security appeal, challenging the ALJ's decision dated July 26, 2005. See generally Compl. (Doc. 3); Pl.'s Br. (Doc. 9). The ALJ found Mr. Durant suffered the severe impairment of mild mental retardation and the non-severe impairment of affective disorder, but that those conditions did not preclude him from performing a limited range

of very heavy work. See ALJ's Decision, R. at 19.¹ The vocational expert testified that an individual with Mr. Durant's limitations could perform jobs that existed in significant numbers in the national economy, and the ALJ found the Claimant not disabled at step five of the sequential analysis. See *id.*

Unfortunately for the Commissioner, the ALJ's analyses cannot withstand judicial scrutiny at steps two and three.

First is the determination that Mr. Durant's affective disorder was non-severe. See ALJ's Decision, R. at 15. The ALJ's decision offers only a conclusory statement, with no explanation why the impairment imposed "no more than a minimal effect on [the Claimant's] ability to work." See McCrea v. Commissioner of Soc. Sec., 370 F.3d 357, 360 (3d Cir. 2004) (citations and internal quotations omitted). Even assuming his determination to be correct, the ALJ failed to "sufficiently articulate his assessment of the evidence" so that the court may "trace the path of [his] reasoning." Books v. Chater, 91 F.3d 972, 980 (7th Cir. 1996) (citations and internal quotations omitted); Mongeur v. Heckler, 722 F.2d 1033, 1040 (2d Cir. 1983)

¹ Claimant's counsel asserts that the ALJ found Mr. Durant's mild mental retardation non-severe. See Pl.'s Br. at 8. As recognized by the Defendant, however, counsel has misinterpreted the ALJ's decision. See Def.'s Br. (Doc. 11) at 14 (conceding severity of mental retardation); see also ALJ's Decision, R. at 15-16 (identifying affective disorder as "non-severe," omitting reference to "non-sever[ity]" in connection with mental retardation, and proceeding to step three Listings, an analysis unnecessary for claimant without severe impairments).

(same).²

Next is the ALJ's analysis under the Listings. His decision first makes reference to Section 12.00, which contains subsections regarding various "[m]ental [d]isorders." See ALJ's Decision, R. at 16. The decision later identifies 12.04, regarding "[a]ffective [d]isorders," as the relevant subsection. See R. at 17 (citing § 12.04, and discussing "'C' criteria" contained therein); *see also* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.04. Notably absent from the ALJ's decision is any reference to the Listing that addresses "[m]ental retardation" and contains provisions regarding individuals like Mr. Durant with IQ scores between 61 and 70. See § 12.05, 12.05(C)-(D) (persons with valid IQ scores between 61 and 70, manifested before age 22, are disabled if they exhibit other specified limitations); *see also* Def.'s Br. at 16-17 (conceding Mr. Durant met threshold IQ requirements, but arguing substantive limitations were absent).

The ALJ's Listing analysis is puzzling. As noted above, he concluded without explanation that Mr. Durant's affective

² The Defendant argues that Mr. Durant's "schizoaffective disorder did not meet the [twelve month] durational requirement" under the "severity" regulations. See Def.'s Br. at 11-12. The flip side of the ALJ's duty to meaningfully articulate his reasoning, however, is the Commissioner's inability to supply independent bases for an affirmance of the disability determination. See Thompson v. Barnhart, 281 F. Supp.2d 770, 776 (E.D. Pa. 2003) ("it is impermissible for a district court to rectify ALJ errors by making an independent analysis and relying on information not relied upon by the ALJ") (citing Fargnoli v. Massanari, 247 F.3d 34, 44 n.7 (3d Cir. 2001)).

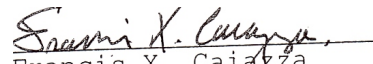
disorder was non-severe. The ALJ's subsequent analysis of the affective disorder under the Listings, which contemplate impairments so severe they are presumptively disabling, was illogical.

Meanwhile, the ALJ ignored the Listing regarding mental retardation, an admittedly severe impairment suffered by the Claimant, despite Mr. Durant's obvious qualification for the provisions addressing individuals with IQ scores between 61 and 70.

The court cannot indulge Defense counsel's independent analyses in an attempt to justify the ALJ's ultimate conclusion. *Cf.* Def.'s Br. at 15-18 (analyzing disability determination under Listing 12.05, despite ALJ's failure to mention or discuss same). A remand is necessary, and the ALJ should conduct a disability redetermination beginning at step two of the sequential analysis.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4 (B) of the Local Rules for Magistrates, objections to this Report and Recommendation are due by September 18, 2006. Responses to objections are due by September 28, 2006.

September 1, 2006


Francis X. Calizza
U.S. Magistrate Judge

cc (via email):

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Jessica Smolar, Esq.